

**AFE BABALOLA UNIVERSITY ADO
EKITI, EKITI NIGERIA**

College of Law

2019/20 session

Course Title: LPB 514 Health Law II

Topic: **Medical Law and Reproductive
Rights**

Lecturer: *Professor E. Smaranda OLARINDE, FArb., FCAI*

Date: *8th April, 2020*

LOGISTICS

Wednesday 11.00 am

Tuesday 8.00am

Class Rep- 2016/2017 Tosin Adunmo- 08063719422

Class Rep-2017/2018

Class Rep-2018/2019-Ope 09024097519

Class Rep-2019/2020-Tolu Soji-Oye

➤ **1st class Wednesday 8.04.2020**

CONTENT

Medical Law and Reproductive Rights

- **Section 1.** Introduction
- **Section 2.** Abortion
- **Section 3.** Advanced Directives/Decisions (AD)
- **Section 4.** Assisted Reproduction /Conception

OUTCOME

At the end
of this
module
you will be
able to:

- Explain the main **reproductive rights (RR)** and guide doctors/patients on **RR application**.
- Examine **Abortion** as the conflict between the moral status of an embryo and a woman's right to procreative autonomy.
- Understand **Advanced Directives (AD)** and discuss the circumstances when AD are valid and applicable.
- Explain and discuss **Assisted conception**

MAIN REFERENCES

1. Olomojobi, Yinka 2019 Medical and Health Law: the Right to Health Lagos, Princeton & Associates Publishing Co. Ltd. (Chapters 8, 11 & 13)
2. Emiri, F. O. 2012 Medical Law and Ethics in Nigeria Malthouse Press Ltd. Lagos (Chapters 2, 3, 4,6 & 12)
3. Olopade, O. 2008 Law of Abortion in Nigeria Ibadan, College Press and Publishers Lid. Lead City University
4. Gillon, R. 2003 Philosophical Medical Ethics UK John Wiley & Sons (chapters 9, 10,11, 12, 29& 20)

Section 1. INTRODUCTION

What are human rights? (Various definitions)

- *“...something of which no one may be deprived without a great affront to justice. There are certain deeds which should never be done, certain freedoms which should never be invaded, some things which are suppressively sacred.”* (Cranston M. 1967 Human Rights: Real and Supposed Blooming 52)
- *...claims, which are invariably supported by law, made on society...they are rights which every individual claims or aspires to enjoy irrespective of his colour, race, religion or status in life.”* (Umozuruike U O 1979 The African Charter on Human and people’s Rights Martinus Nijhoff Publishers 4)

Section 1. INTRODUCTION- Positive and Negative Rights

There are differences between negative and positive Rights:

- A negative right implies a right to non-interference - **not to be killed**
- A positive right imposes positive duties of support or help on others - A positive right to life imposes a duty on the health care providers that proper health care is provided to ensure life is saved.

NOTE:

- It is only the person involved who can request that the duty is performed or who can waive that right
- There are few absolute rights that can not be justifiable in any circumstances such as the right to life

Reproductive Rights

- What rights are important to medical law?
- What are the most important rights to human reproduction?

Section 1. INTRODUCTION Contd.

Many rights are important to medical law

The most important rights to human reproduction are:

- 1. Right to autonomy
- 2. Right to dignity
- 3. Right to life

What is the meaning of -
“**Right to Autonomy**”?

**Freedom vis-a-vis
Acting autonomously**

Autonomy- meaning

Autonomy- is the capacity to think, decide and act on the bases of such thought and decision freely and independently and without hindrance.

It is important to distinguish between freedom and acting autonomously

- **Freedom** , liberty, license, or simply doing what one wants to do; and on the other hand
- **Acting autonomously**, which may also be doing what one wants to do but on the basis of thought or reasoning

Animals are not said to have autonomy but they may be perfectly free, at liberty , if they are not constrained

Autonomy- meaning contd.

- Autonomy- is a subclass of freedom or liberty
- **But not all freedom and liberty is Autonomy**
- The concept of autonomy incorporates the exercise of what Aristotle called ' man's specific attribute'

“rationality”

Autonomy- Types

Remember
we are
discussing
Patients

Autonomy- is sometime subdivided into:

- **Autonomy of Thought-** includes a wide range of intellectual activities that are called 'thinking for oneself'
- **Autonomy of will-** Autonomy of intention or decision- freedom to do things on the basis of one's deliberations
- **Autonomy of action-** The patient whose voluntary muscles are paralyzed but is conscious because he was subjected to a spinal cord anesthesia. He has the autonomy of thought and he is "active" but his Autonomy of action is temporarily absent.

Respect for AUTONOMY

- Autonomy must be distinguished from what is often known as the principle of autonomy
- It is essentially the **moral requirement to respect other peoples autonomy**

REPRODUCTION: RIGHT TO AUTONOMY

1. Sterilization

2. Procreative autonomy-

a) Personhood argument

b) The argument that an embryo is a human being

c) The potentiality argument

RIGHT TO AUTONOMY

WHAT IS

STERILIZATION?

1.1. Right to autonomy: instances

A. Sterilization

- Every adult person has a right to decide whether to have children or not
- Sterilization is a medical procedure to make a person incapable of having children

1.1. Right to autonomy: instances

▪ *General principles*

- A person must be 18 years or older to consent to sterilization (different law apply in different jurisdictions)
- The law allows for the sterilization of a person with severe mental disability provided their parents, spouse, guardian or a close relative and the hospital also agrees

1.1. Right to autonomy-instances contd.

WHAT IS

Procreative autonomy?

1.1. Right to autonomy-instances contd.

2. Procreative autonomy-

- Is a woman's freedom to terminate a pregnancy

- Issues to consider:

- At what point of development would a foetus gain a right to life?

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1.1. Right to autonomy- instances contd.

a. Personhood argument

b. The argument that an embryo is a human being

c. The potentiality argument

1.1. Right to autonomy- instances contd.

a) Personhood argument- definition of person is crucial

❖ If a Person is someone ***who can make choices, is self aware, understands the consequences, etc.*** then a foetus is clearly not a person and has no claim to right to life

NOTE:

➤ according to this definition persons in a persistent vegetative state will not count as 'persons' and lack a right to life

➤ ***surely it is exactly those who lack autonomy who need protection***

1.1. Right to autonomy-instances contd.

2. Procreative autonomy- contd.

b)The argument that an embryo is a human being

❖ If an embryo is a human being then:

- Has full moral status;
- Has a right to life from the moment of conception (or development);
- Hence accords moral status and right to life to a mass of cells by virtue of being a member of human species.

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1.1. Right to autonomy-instances contd.

3. Procreative autonomy- contd.

c) The potentiality argument states :

- Although an embryo is not a person should be treated as such because it has the **potentials** to become one
- If the fertilized egg is **potentially** a human being (provided it implants and don't spontaneously abort) then the unfertilized egg and sperm also have the potentials to become human beings (**provided they meet and do not encounter a contraceptive!!!**) Harris J. *The value of Life*, London, Routledge,1985

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1.1. Right to autonomy

SELF ASSESSMENT QUESTIONS

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1.1. Right to autonomy-Assessment questions.

- 1) At what point then would a foetus gain a right to life?
- 2) If foetus are accorded full moral rights from conception does this justify harm to the woman whose life or health is at risk?
- 3) Should not a woman's right to determine what happens to her body override any rights of the foetus even where there is no harm to her?

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What is the meaning of 'Right to human dignity'?

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1.2. Right to human dignity

□ Discuss the following Scenario:

Abdul: 'There goes Ramona. I have not seen her in a long time'

John: 'She is not looking very well. She has lost a lot of weight'

Bad Gossip: 'Have you guys not heard Ramona has won the 'lotto' You know what I mean she is '4x4'.

In some parts of South Africa :

- ***'Won the lotto' means infected with HIV***
- ***4x4' means the person has full blown AIDS***

1.2. Right to human dignity

□ Meaning

- People should not insult or hurt the **feeling** of one another.
- One essential part of people's dignity is the right to decide what happens to their bodies- right to **freedom and security of the person**.
- people's dignity also includes the right to **bodily and psychological integrity**
- the right to bodily and psychological integrity includes **the right to make decisions concerning reproduction**

1.2. Right to human dignity

- ❑ The right to human dignity is also one of the values on which the 1999 Constitution (as Amended) of the FRN is based
- ❑ Human dignity requires us to accept that every person is of the same value and is a worthy member of our society
- ❑ This means that every person is **entitled to be treated with respect**
- ❑ If one person defames another person's good name the first person will also infringe the second person's human dignity

1.2. Right to human dignity

If one person defames another person's good name the first person will also infringed the second person's human dignity

**What is the meaning of
'Right to life'**

When does life begin?

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The beginning of life

□ Social and legal uncertainty about the status of a foetus:

'Part of that uncertainty results from the complexity of the whole biological process.

Part results from the diversity of views, past and present, about that status.

Part results from the lack of agreement as to how to reach consensus on the problem'

(Law Reform Commission Canada)

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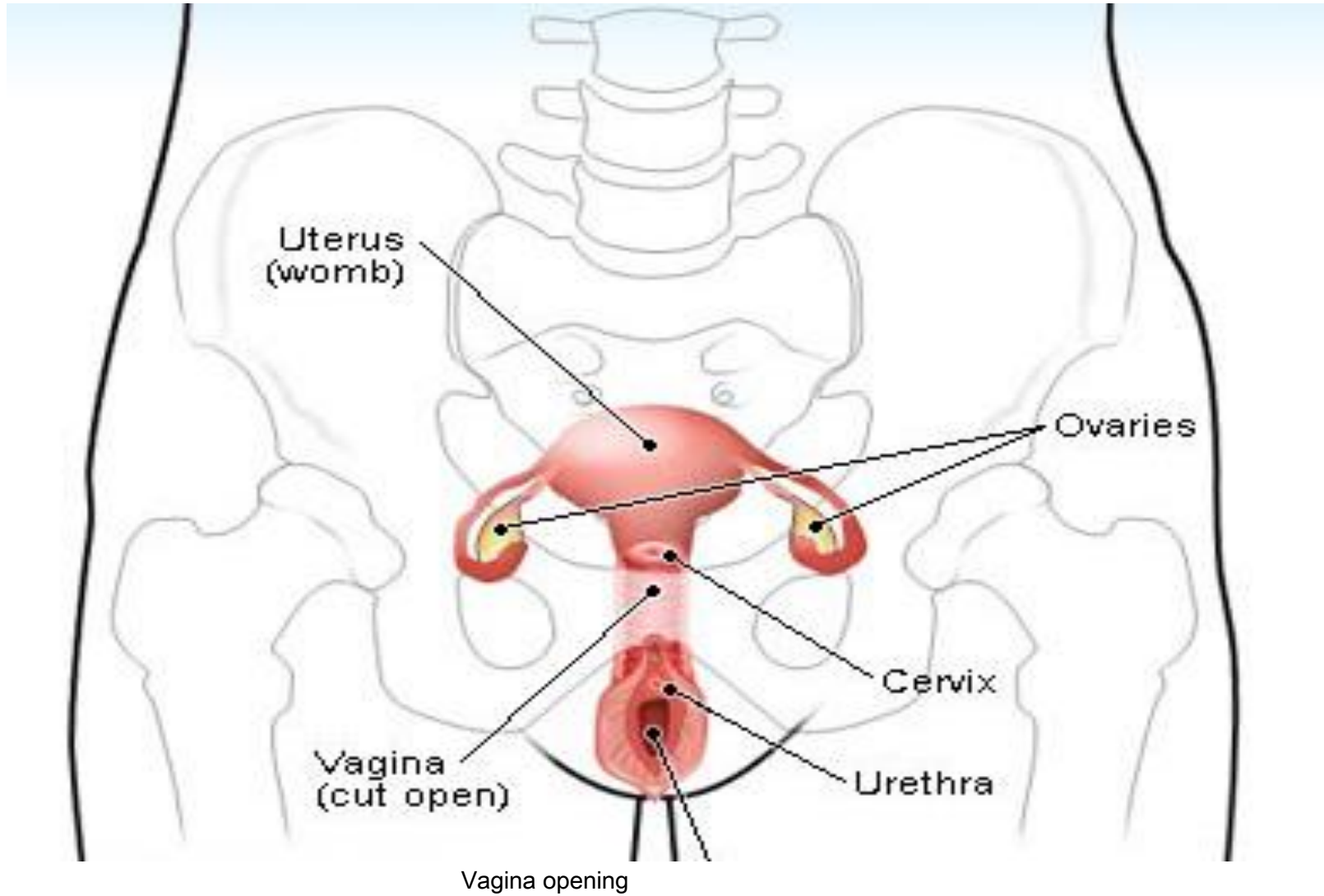
Understanding Foetal Development

**A discourse of Foetal development in
the womb and the beginning of life.**

*(Olapade, O. 2008 Law of Abortion in Nigeria College Press & Publishers Ltd. Lead City
University, Ibadan, Nigeria 103-108)*

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Understanding Foetal Development



When does life begin

- Life begins when there is a union of an ovun and a spermatozoon.
- It usually takes place at the ampulla of the fallopian tube
- About 36-38 hours post ovulation
- **The ovum**
 - is approx. 0.2 millimeters in diameter
 - Has a protective covering over, the yolk
 - The nucleus is at the center
 - Is incapable of moving on its own

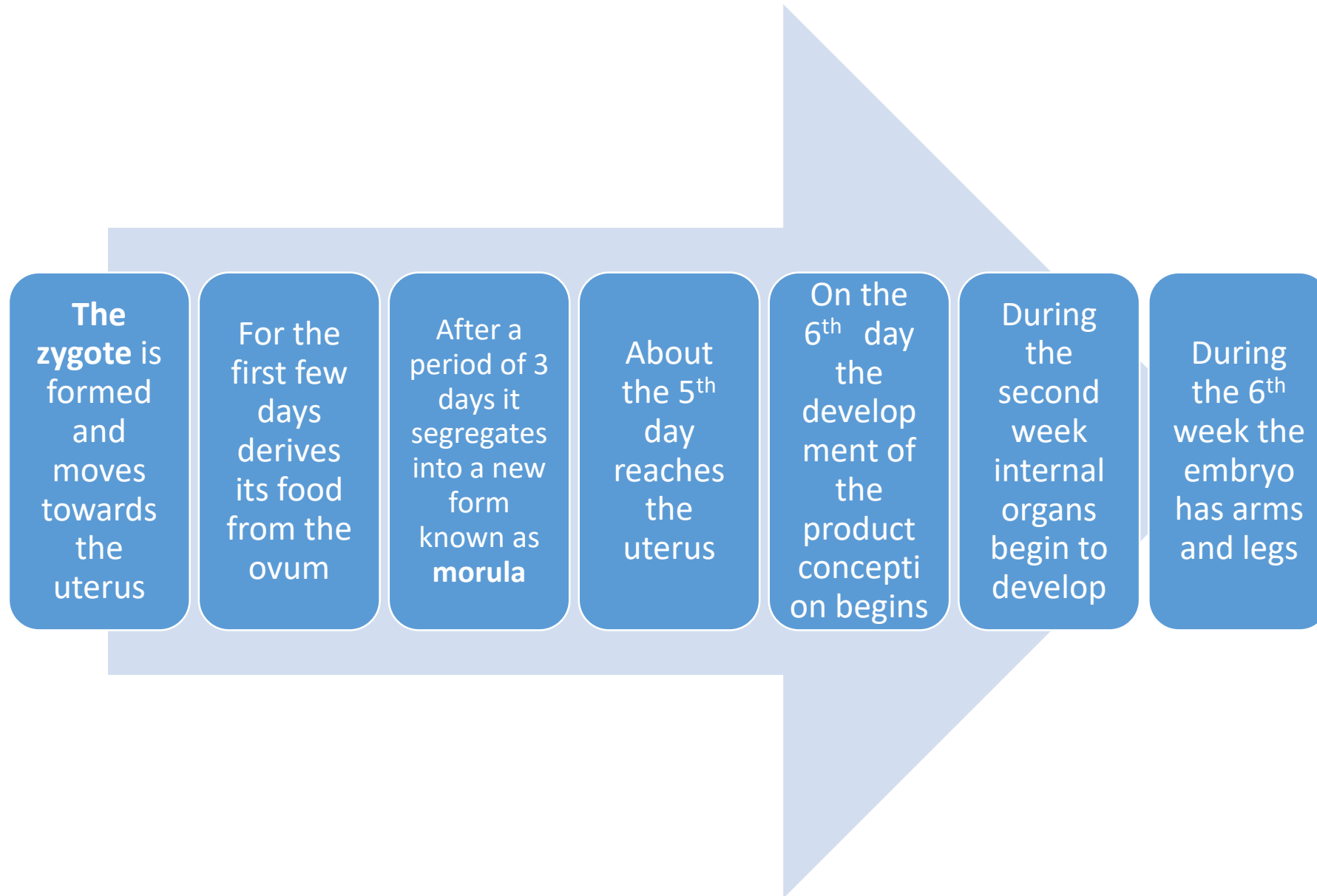
When does life begin contd.

- The spermatozoon:
 - Is very small
 - Has a head, neck, body and tail
 - Is mobile
- During the sexual intercourse on the average a male ejaculates @ 400 million sperm cells into the vagina (most of them however die shortly)
- The sperm moves into the uterus and down the fallopian tubes

When does life begin contd.

- If a living ovun is met the sperm is chemically attracted to it and enters leaving behind the body and tail
- The nucleus passes into the yolk where both nucleus unite
- As soon as a spermatozoon enters a membrane forms around the egg
- It is impossible for a sperm to enter while another has done so
- **The zygote** is then formed

When does life begin contd.



Right of an unborn child

- *Right of an unborn child to protect against harm etc.*

WHAT ARE THE PROVISIONS OF THE NIGERIA Child's Rights Act, 2003, the various Child's Rights Laws and other legislations?

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Right of an unborn child

□ *Right of an unborn child to protect against harm etc.*

‘(1)A child may bring an action for damages against a person for harm or injury caused to the child wilfully, recklessly, negligently or through neglect **before, during or after the birth of that child**’. (17 Child’s Rights Act, 203)

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Right of an unborn child Contd.

‘(2) Where the father of an unborn child dies intestate, the unborn child is entitled, if he was conceived during the lifetime of his father, to be considered in the distribution of the estate of the deceased father.’(17 Child’s Rights Act, 203)

‘(3)Where the mother of an unborn child dies intestate, the unborn child is entitled, if he was conceived during the lifetime of his mother, to be considered in the distribution of the estate of the deceased mother’.(17 Child’s Rights Act, 203)

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When does a child become a human being?

☐ “A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not”

(section 307 Criminal Code Act Cap C38 LFN 2004; and 220 Criminal Penal Code)

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When does a child become a human being? Contd.

- ❑ Before an unborn child could be regarded as a ***person capable of being killed*** two conditions must be present:
 - The child must be completely extruded from his mother's womb
 - The child must have an independent existence from that of the mother

NOTE:

- It is not essential that the umbilical cord and that after birth be detached from the mother, or removed from the mother or extricated from the child
- **It is essential to prove that the child is born alive failing this a charge for murder or homicide cannot be sustained**

When does a child become a human being? Contd.

❑ ***STATE v. Linus Akpan*** (1972) 2UILR 457

Facts:

The accused persons were charged with killing a child in consequence of an act omitted to be done during child birth contrary to section 247 of the Criminal Code Act.

Held:

Since there was no proof that the child was born alive, the offence with which the accused persons were charged could not be sustained

Compare with:

R v Senior (1832) Mood C.C.346 (English case of medical negligence; during delivery the compression of the skull of a child by the midwife, led to his death)

R v Castles (1960) W.W.N. 36 (Queensland case: abortion was induced on an woman who was @22 weeks pregnant. Child was born alive but died 2 hours later. Accused was charged with manslaughter . On appeal decision reverted to the offence of abortion)

What is Abortion?

2. Abortion: and the law

Induced Abortion- legal context

- is the **artificially induced** expulsion of an embryo or foetus

Miscarriage

- is not defined in criminal/penal law
- In its popular sense it is synonymous with abortion
- Consists in the *expulsion* of the embryo or foetus
- **Expulsion of the immature product of conception**

2. Abortion: and the law Contd.

Abortion is a
controversial
issue

- **Meaning**- generally
 - abortion is a crime in Nigeria (Criminal Cod Act ss. 228, 229, 230)
 - abortion is illegal
- **Exception** – (Abortion becomes legal)
- Permitted in very limited circumstances such as:
 - where the continued pregnancy would endanger the life of the woman(297 Criminal Code Act)
 - Where the child when born would be seriously handicapped
 - Where the pregnancy is a result of rape or incest

2. Abortion: and the law-*Exception* Contd.

Exception -A
person shall not
be guilty of an
offence under the
law relating to
abortion:

- When a pregnancy is terminated by a registered medical practitioner
- When two registered medical practitioners are of the opinion formed in good faith:
 - ***a. That the pregnancy has not exceeded its 20th week and***
 - The continuing of pregnancy would invoke risk greater than if the pregnancy were terminated

2. Abortion: and the law-*Exception* Contd.

Exception -A
person shall not be
guilty of an
offence under the
law relating to
abortion:

- ***b. That the termination of pregnancy***
 - is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman
- ***c. That the continuance of the pregnancy***
 - Would involve risk to the life of the pregnant woman greater than if pregnancy were terminated
- ***d. That there is a substantial risk that if the child were born***
 - It would suffer from physical or mental abnormalities as to be seriously handicapped

Abortion: and the law Contd.

It is important to note that **the law limits the legality of abortion:**

- To those circumstances where the foetus or the unborn child is not capable of being born alive
- A person shall be liable of the crime of ***child destruction*** when an abortion involves destruction before birth of a '***child capable of being born alive***'
- Evidence that a woman had been pregnant for 28 weeks or more raises a presumption that her child '***is capable of being born alive***' (English Infant Life (Presumption) Act 1929 ss. 1(1) and (2))

Abortion: and the law Contd.

Summary

Abortion is an intentional expulsion of the product of conception any moment from conception up till the birth of the child

Induced abortion is the wilful expulsion of the foetus before birth, save for the exceptions, is unlawful and amounts to criminal abortion

2. Abortion Contd.

□ Right of women to Counselling

- Counselling must be made available for the woman both before and after the termination of the pregnancy
- The reason(s) for abortion must be clearly explained
- The likely effects must also be made clear

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Assessment

1. Do you agree with the provisions of the Nigerian law which makes abortion an offence? Give reasons for your answer.
2. Discuss Abortion and the right to make decisions concerning reproduction in Nigeria.
3. What reforms do you proffer in this area of the law in Nigeria?
 - a. Give reasons and substantiate your answer with lessons learned from other jurisdictions.
 - b. Considering the socio cultural peculiarities of Nigeria proffer ways for the implementation of the suggested reforms.

Assessment Contd.

- 4. *‘Having a ‘right to life’ is not indicative of jeopardizing the life, welfare and wishes of the carrier of the pregnancy. It is not only unjust but also morally wrong to exercise a right over the chattel or on the land that belongs to another’*** (Olopade, O. 2008 *Law of Abortion in Nigeria* Ibadan, College Press and Publishers Ltd. 31)

Examine the above statement in the light of the conflict between the moral status of an embryo and a women’s right to procreative autonomy.

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VIRTUAL LECTURE 2

Advanced Directives/Decisions (AD)